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No. 65, Original

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IN THE  
**Supreme Court of the United States**  
October Term, 1975

STATE OF TEXAS, *Plaintiff*

v.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

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**NEW MEXICO'S REPLY TO TEXAS'S OBJECTION**

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**STATEMENT OF THE CASE**

The discussion of engineering methods and techniques in Texas's statement of the case provides a useful explanation of the 1947 condition routing study and the inflow-outflow relationship developed from that study. There are three matters, however, that should be clarified.

In describing how the routing study was designed to illustrate for each year of the period of study how the river would have responded if the 1947 condition stage of development existed during those years, Texas stated that "(r)eservoirs, uses, losses, and groundwater contribution all reflect the 1947 condition,

while the surface water supply each year depicts that which was actually available." (Texas's Objections, p. 4). The statement is not strictly correct. Only the computed flood inflows below Alamogordo Reservoir purport to depict the surface water supply actually available. In preparing the routing study, the surface water supply flowing into Alamogordo Reservoir was adjusted to reflect 1947 condition depletions rather than historic depletions above Alamogordo Reservoir; that part of the surface water supply attributable to ground water contributions was adjusted to reflect the 1947 condition of such contributions.

A related problem is the statement that in developing the correlation shown in Plate No. 2 of S.D. 109 (p. 154), the engineers plotted the inflow each year (or the water available) against the outflow. (*Ibid.*, p. 5). In fact, what was plotted was an "index" of the inflow instead of the total water available. That index inflow includes neither the ground water contributions to the surface water supply nor the ground water available and being taken from underground sources.

Because the index inflow does not include groundwater sources, it follows that if the groundwater contribution to the surface water supply (frequently referred to as "base inflow") becomes less than it was in 1947 as a result of the continuation of the ground withdrawals, as the Report of the Engineering Advisory Committee projected it would, a negative departure from the inflow-outflow relationship established by the 1947 condition routing study would be indicated. This negative departure would not be the result of new depletions by man's activities in New Mexico.

Texas implies, in this regard, that New Mexico proposed that she be allowed the projected complete depletion of the base inflow to the river that the Engineering Advisory Committee projected would ultimately result from the continuation of

existing ground water pumping in New Mexico and that the adoption of the 1947 condition routing study as a basis for the compact instead of the 1947-A condition routing study, which reflected the complete depletion of the base inflow, constituted a rejection of the New Mexico proposal. This implication is not supported by the record. In fact, New Mexico proposed the use of the 1947 condition routing study, recognizing that that study approximated what the situation on the river would be with the base inflow entirely depleted and the water salvage that was projected by the engineers effected. (*See, New Mexico's Objections*, pp. 66-80).

Texas also states that in evaluating post-compact deliveries each year the actual inflow into the river during the post-compact year is calculated. It is important to note that in evaluating deliveries it is the *index* of the actual inflow that is calculated to enter Plate No. 2.

Finally, Texas argues that she bears alone "the burden of underdeliveries due to increased natural losses." (*Texas's Objections*, p. 6). In fact, both states must bear the burden of any increased natural loss after 1947. While such losses are not chargeable as increased depletion due to man's activities, the losses would diminish the supply available to the surface water diversion works existing in New Mexico under the 1947 condition, thus causing New Mexico to share the burden of increased natural losses.

#### SUMMARY OF ARGUMENT

Texas's objection to the Master's finding respecting the nature of the 1947 condition is essentially a statement of her recently acquired view that the 1947 condition is not a stage of development in the Pecos River Basin in 1947, but rather is an erroneous mathematical description of that condition. Until

Texas's delegate to the Pecos River commission, who was a stranger to the Pecos River Compact until his appointment in 1968, attempted to unilaterally repudiate nearly twenty years of mutually acceptable compact administration, the actions of Texas's representatives and engineering advisors provided unequivocal support for the Master's opinion that the 1947 condition is reality, with two exceptions designed to protect federal interests. Texas's current position is refuted by the express terms of the compact, by Mr. Tipton's contemporaneous explanation of the compact, and by the administrative actions of the representatives of both states.

Texas asserts that the erroneous description of the 1947 condition in the initial engineering report constitutes a mutual mistake of fact to which New Mexico is bound. Her understanding of the law, however, does not survive analysis, and her belief that the erroneous data are intrinsically the basis of the compact renders queer and irrational the behavior of the representatives of both states who struggled for years to make the compact work. There is no mistake of fact. The people who negotiated and urged the adoption of the compact were the same people who assumed the responsibility for its administration. Their construction of the meaning of the 1947 condition complements the Master's finding. Texas cannot now unilaterally repudiate historical fact.

Stripped of its rhetoric, Texas's argument is an expression of regret over the fact that the 1947 condition is the stage of development in the Pecos River Basin in 1947 instead of a mistaken illustration of that condition that vitiates the bargain agreed upon.

## ARGUMENT

### POINT I: The 1947 condition is an objective stage of development existing in the Pecos River Basin in 1947.

Texas's objection to the Master's report goes to the essence of his finding on the basic question which was to have been decided as a result of the first segment of trial — whether the 1947 condition is an artificial condition existing intrinsically as the "Summary of Operations — 1947" in the initial Report of the Engineering Advisors or whether it is the situation of physical circumstances existing in the Pecos River Basin in 1947. While the Master listed his finding as the first of three "conclusions" on the 1947 condition (Report, p. 41), his "conclusion" is a conclusion only in the sense that it is his final decision on a question of fact.

There is some question as to what weight the Court will give a Master's findings. Although Supreme Court Rule 9(b) would appear to incorporate the "clearly erroneous" standard embodied in Rule 53 (e) (2) of the Rules of Civil Procedure and used by federal district courts in dealing with exceptions to reports of special masters, decisions in original actions between states indicate that it does not. The reason for the difference apparently lies in the delicacy and importance of conflicts between states. Justice Douglas, dissenting on other grounds in *Mississippi v. Arkansas*, 415 U.S. 289 (1974), stated:

Heretofore the Court has not considered itself limited in its review of its Masters by the "clearly erroneous" test. We said in *United States v. Utah*, 283 U.S. 64, . . . that the Master's judgment "accords with the conclusions we make from our own independent examination of the record." (at 296-97).

In other original actions between states, the Court's review of

the findings of a Special Master to which exceptions have been taken turned on whether a preponderance of the evidence supported the Master's findings. See, *Kansas v. Missouri*, 322 U.S. 213 (1944); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297 U.S. 517 (1936). A seemingly different form of deference was accorded in two other cases. In *Kansas v. Missouri*, 322 U.S. 213 (1944), it was stated that "(t)he Master saw and heard the witnesses. . . . We find no basis in the record for any conclusion that he performed his task with other than fair, disinterested, painstaking effort and attitude." (at 231). And in *Louisiana v. Mississippi*, 282 U.S. 458 (1931), the Court indicated that deference would be accorded the Master at least to the extent that there were issues of credibility. In the case at bar the important point is that the deference accorded the Master's "conclusion" on the 1947 condition should be the deference accorded a master's findings.

New Mexico contends that the 1947 condition contemplated by the negotiators was the then "present situation on the river," with two exceptions designed to accommodate federal reclamation interests to encourage the consent of Congress, viz., water was to have been routed through the Carlsbad Irrigation Project as though it had been developed to 25,055 acres and through the Ft. Sumner Project as though it had been developed to 6,500 acres. (S.D. 109, p. 10, *see also*, Tipton's explanation, *id.* at 113). In all other respects the 1947 condition was understood to have been the physical reality of the river, i.e., a set of actual circumstances sought to have been described with reasonable accuracy in the "Summary of Operations—1947" contained in the Report of the Engineering Advisory Committee and depicted in the Inflow-Outflow Manual's various plates, which were designed to provide a base against which post-1947 departures could have been measured. In New Mexico's view, the description of the 1947 condition found in S.D. 109 and initially thought sufficient for use in the commencement of compact

administration was just that, i.e., a *description* of river conditions. This description was an approximation of the river conditions in 1947 and is alterable to more closely define the condition as hydrological data and engineering techniques warrant.

Texas maintains that the 1947 condition in S.D. 109 defines nothing, but rather is intrinsically the basis of the compact. Texas contends that the 1947 condition is not an initial mathematical approximation of the circumstances of the river; rather, it was *created* to apportion the waters of the Pecos River. According to Texas, on the seventh day the engineering advisors rested.

To support its position Texas urges that "(t)he drafters of the Compact defined the 1947 Condition exclusively in terms the Report of the Engineering Advisory Committee." (Objections to the Report of the Special Master on the Obligation of New Mexico to Texas under the Pecos River Compact, p. 14, hereinafter referred to as Texas's Objections). Texas's position is refuted by the terms of the compact itself, by its explanation by Mr. Tipton, and by the contemporary administrative actions of the representatives of both states.

### **Compact Provisions**

Basically, Texas argues that:

The Article II(g) definition of the 1947 Condition is definite and precise. It ties the 1947 Condition to the Report of the Engineering Advisory Committee and allows no departure from, or modification of, that definition. (Texas's Objection, p. 15).

Article II(g) reads:

The term '1947 condition' means that situation as described and defined in the Report of the Engineering Advisory Committee. In determining any question of

fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

According to Texas the language of the article explicitly makes the 1948 Report of the Engineering Advisory Committee the 1947 condition, thus implicitly prohibiting any revision to what Texas continually refers to as an unalterable "definition."

New Mexico agrees that the answer to the question before the Court can be discerned from the language of II(g), but, as did the Master, we attribute a different significance to those words. The article does not say: "The 1947 condition' is the description contained in the Report of the Engineering Advisory Committee." The words "term," "situation," "as," and "described" have syntactical significance. The "1947 condition" is a term or name for something its description is not. A situation exists; a term only names it. The use of the word "as" complements this distinction by indicating that the description was understood to be a likeness — to paraphrase: 'The term '1947 condition' means that situation on the Pecos River the likeness of which is described and defined in the Report of the Engineering Advisory Committee.' Finally, a "description" is a representation of a reality and is not itself that reality. The use of all these terms makes it impossible to read Article II(g) as Texas does as a statement of absolute identity between the description of the 1947 condition and the condition itself.

Read in *pari materia* with Art. II(g), other compact articles support the Master's reading of Art. II(g). Article V(d) gives the Pecos River Commission the power to:

4. Collect, analyze, correlate, preserve and report on data as to stream flows, storage, diversions, salvage and use of the waters of the Pecos River. . .
5. Make findings as to any change in depletion by man's activities in New Mexico;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;
12. Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder. . . .

The power enumerated in paragraph 5 cannot be exercised without the most accurate definition of the 1947 condition possible. Otherwise the task of isolating departures due to man's activities from gross departures indicated by a relatively inaccurate 1947 condition standard would become unnecessarily complex because of the effect of the initial inaccuracy on the indicated gross departures.

#### Tipton's Explanation

Tipton's explanation of the compact also supports the Master. At the final negotiation meeting on December 3, 1948, he explained:

In my opinion it would have been very unwise for the commission to have set out in this compact what might be called a schedule. It would have been unwise for several reasons. The commission may devise, as time goes on, a better means to determine this (the amount of water Texas would be entitled to receive under paragraph (a) of article III) than by the inflow-outflow method. *It may perfect more nearly the curves which appear in the engineering advisory committee report.* We are having difficulty now in regard to one compact which involves three States, one of them being the State of Texas, where we are trying to change the schedule without changing rights and obligations. It appears that we will have to go to the legislature to change the schedule. The way the Pecos compact is written, the commission has full authority to change the method, or to perfect the technique, so long as

what is done by the commission is something directed at the determination of the obligation under III(a). (S.D. 109, p. 117, emphasis added).

Both states approved the compact subject to the Tipton explanation. (S.D. 109, pp. 114 and 119). Perfection of the curves could only mean making them a more accurate tool for detecting departures from the 1947 condition. Texas admits that a change in the curves could only result from a change in the underlying analysis of factors which made up the routing study. (Tr. 740-742). Texas also concedes that the curves represent the values found in the 1947 river operation study. (Texas's Brief on the 1947 Condition, p. 9). A change in the curve of Plate No. 2, for instance, could only result from a change in the river operation study. Tipton explained to the compact commission that the administrative agency created by the compact would have authority to do both. The compact was adopted subject to that explanation, and Tipton's explanation supports New Mexico's reading of Articles II(g), V(d), and III(a).

Mr. Tipton also made it clear that with two exceptions the description of the 1947 condition was intended to represent conditions on the river as they actually existed in 1947:

(The) '1947 condition' relates to a condition on the stream and does not relate to the water supply that occurred in the year 1947. There may be some confusion about that. There were certain conditions that existed on the river, such as the diversion requirements of the Carlsbad project, which the engineering advisory committee assumed; the salt cedar consumption; the reservoir capacities that existed in 1947; the operation of the Fort Sumner project up to 6,500 acres; *and the operation of all other projects on the stream as they*

*actually existed in 1947.* S.D. 109, p. 113, emphasis added).<sup>1</sup>

### **Administrative History**

Texas contends that the 1947 condition inflow-outflow relationship as depicted by Plate No. 2 of S.D. 109 is immutable and to support this contention argues that from 1950 until 1957 the commission's engineers were engaged in correcting and improving the Inflow-Outflow Manual and that it was not until 1957 that the scope of the engineering work was expanded to include a re-study of the 1947 condition. (Texas's Objections, p. 12). This argument is not supported by the record.

Nearly all of the representatives of the states who participated in the negotiation of the compact were involved in its post-ratification administration. At the outset of administration in 1949 both states adopted the Tipton view as to the mutability of the description of the 1947 condition.

The process of administrative cooperation began at the second meeting of the full Pecos River Commission on December 9 and 10, 1949. Speaking for the Program and Budget Committee, John Erickson recommended that the commission "determine more accurately the '1947 condition' as defined in the compact by studying and investigating the items recommended in the Inflow-Outflow Manual directed toward a more

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1. In its objections Texas states: "The Master notes, and Texas admits, that the Article II(g) definition results in a '1947 condition' which is artificial." (p. 15). We are unable to find anything in the record indicating that the Master has so noted. On the contrary, the Master has stated that he "is convinced that 'situation' as used in the compact refers to tangible reality, not synthetic imagery. The artificiality of the routing study does not change the compact meaning." (p. 36).

accurate determination of the inflow-outflow relationships." (S.D. 109, p. 150; Stip. Ex. 4, Minutes, PRC, December 9, 1949, p. 8).<sup>2</sup>

It was clear to the committee that the items proposed to be studied involved the necessary relationship between post-1947 inflow-outflow computations and the 1947 condition against which they would be assessed. To consider changing one meant considering changing the other. The proposal itself was directed to the "1947 condition" as defined in the compact. . . ." Both states agreed to the proposal, and it was adopted by the commission. From the outset — and without any knowledge of which way a new description would cut — both states agreed that the description of the 1947 condition appearing in the initial engineering reports was a tool that should be refined and sharpened to reflect as accurately as possible the immutable principle of the 1947 condition on the river.

In a hint of more difficult days to come, the Engineering Advisory Committee did report that for the period from 1947 to 1948 the inflow for the reach of the river between Alamogordo Dam and the state line fell below the lowest limit in S.D. 109's Plate No. 2 so that the corresponding outflow

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2. Stipulated Exhibit No. 4 contains the minutes of the Pecos River Commission. These minutes, commencing with the October 25, 1956 meeting, are numbered serially in the upper right hand corner of the page. Citations to the minutes commencing with the October 25, 1956 meeting include the date of the meeting and the number appearing at the upper right hand of the page, e.g., October 25, 1956, Minutes, PRC, p. 163. The minutes prior to the October 25, 1956 meeting are either unnumbered or are consecutively numbered within the particular set of minutes. Citations to the minutes prior to the October 25, 1956 minutes include the date of the meeting and the consecutive number of that particular set of minutes, e.g., February 18, 1956, Minutes PRC, p. 3, where page 3 is the third page of those minutes.

couldn't be computed or compared to what the original studies indicated the 1947 condition delivery should have been. (Stip. Ex. 2, Minutes, EAC, January 16, 1951, p. 10). Independent of the problem of accuracy, the Engineering Advisory Committee's original report on the 1947 condition, which is carried over into Plate No. 2, wouldn't work.

In 1952 the Engineering Advisory Committee recommended to the commission that it undertake a review of the S.D. 109 inflow-outflow studies and computations. The commission agreed. (Stip. Ex. 4, Minutes, PRC, June 27, 1952, p. 1). The Texas Engineering advisor, Mr. Lowry, began that review. By January 3, 1953, he had submitted to the Engineering Advisory Committee:

. . . a preliminary report of his studies on the basis for the inflow-outflow computations, and suggested certain changes. . . . It was agreed that the final result would show a more accurate measure of the 1947 condition . . . . The final report should be submitted as soon as possible. . . . (Stip. Ex. 4, Minutes, PRC, January 22, 1953).

The Engineering Advisory Committee withheld the 1951 inflow-outflow determinations pending completion of the inflow-outflow revision. Computed on the old basis, the reach from Alamogordo Dam to the state line showed a debit of 23,000 acre feet. When the Engineering Advisory Committee reported this to the commission itself, neither state moved that the commission proceed on the departure indicated by use of the old engineering data. Instead, the commission accepted the committee report that inflow-outflow revisions were not yet complete and consequently that no final computations for the 1949-1951 three year period could be made.<sup>3</sup> (Stip. Ex. 4, Minutes, PRC, January 22, 1953 pp. 3-4).

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3. Subsequently the commission determined that it is not empowered to make findings for years prior to 1950. See, Art. VI(b).

By so doing the commission indicated its interpretation of the compact's allocation provisions. The commission's acceptance of the committee's recommendation that no final determinations be made for the 1949-1951 period showed that the commission believed that it would have been contrary to the compact to have based findings on data known to have distorted the 1947 condition. (Stip. Ex. 2, Minutes, EAC, January 17, 1952, p. 9; Stip. Ex. 4, Minutes, PRC, January 17, 1952, pp. 2-3). In a negative sense the commission action also indicated that it was not bound to the Plate No. 2 curve; utilization of the curve would have revealed a departure which the commission thought to be unreasonable so soon after 1948, given the absence of any significant changes on the river. Finally, in a positive sense, the commission action showed that both states agreed that the 1947 condition inflow-outflow standard would be changed to more closely approximate that condition in fact.

To complete that process the Engineering Advisory Committee appointed a subcommittee that was functioning by April, 1953. Named the "Engineering Subcommittee on the Inflow-Outflow Refinement Studies" and made up of engineers from both states, the subcommittee concluded initially "that there is a great deal of additional information available which can and should be used to refine the river gain and loss studies and to better define and establish the 1947 condition." (Stip. Ex. 6, Minutes, I-OS, April 24, 1953, p. 1). In particular the subcommittee proposed to re-study the flood inflow data "in order that present and future computations of the basic inflow and outflow will be on as nearly a comparable basis as possible." (Stip. Ex. 6, Minutes, I-OS, April 24, 1953, p. 1). Whatever discussion there might have been among subcommittee members about the anticipated scope of work was resolved by the Engineering Advisory Committee when it reported to the commission in early 1954:

The original function of the subcommittee was to refine some of the methods used to determine flood inflows which are unmeasured below Alamogordo Reservoir and to correct obvious errors which appeared in the original computations. After some discussion of the problem by the committee it became apparent that the entire matter of inflow-outflow should be reviewed by the subcommittee. . . . The subcommittee, therefore, was instructed to determine as accurately as possible inflow-outflow relationships under the 1947 condition and report back to the Engineering Advisory Committee at the earliest date in order that it may make recommendations to the Commission. (Stip. Ex. 2, Minutes, EAC, January 4, 1954, p. 5).

The commission itself adopted the report and its recommendations and agreed that neither annual reports nor annual departure determinations would be made until the Engineering Advisory Committee and its subcommittee had completed their work. (Stip. Ex. 4, Minutes, PRC, February 15, 1954, p. 4). The working subcommittee itself reported to the Engineering Advisory Committee:

At the annual Commission meeting held January 21, 1954, the sub-committee was instructed to determine as accurately as possible the inflow-outflow relationships that existed under the 1947 condition. (Stip. Ex. 6, Minutes, I-OS, October 21, 1955).

Everyone contemplated a complete re-survey of the 1947 condition standard against which departures would be measured.

Commission assignment of other compact related work to the Engineering Advisory Committee delayed beginning the complete revision, but neither state objected to a work priority that would delay production of a new description of the 1947

condition against which departures could be determined. (Stip. Ex. 2, Minutes, EAC, October 20, 1954, pp. 1-4; Stip. Ex. 4, Minutes, PRC, October 21, 1954, pp. 3-4). By October, 1955, the first priority work of the engineering committee had been sufficiently completed to allow a return to the 1947 condition re-study as previously approved by the commission itself in January of that year. ( Stip. Ex. 4, Minutes, PRC, January 20, 1955, p. 4).

In April, 1957, the issue of the immutability of the 1947 condition inflow-outflow relationship as depicted in S.D. 109's Inflow-Outflow Manual Plate No. 2 formally came to a head. On April 1, the subcommittee presented its report to the Engineering Advisory Committee. (Stip. Ex. 6, Minutes, I-OSC, April 1, 1957). The report included departure determinations. The subcommittee suggested that it had arrived at those departures using techniques different from those in the inflow-outflow manual to determine certain critical values, like flood inflows, necessary to locate the post-1947 inflow point on the existing 1947 condition curve. From that point one would look to the corresponding outflow point on that curve and compare it to contemporaneous outflow data to determine departures for that year. The April 1, 1957 report on departures had altered the manner of entering the 1947 condition curve, but had not changed the curve itself. Nothing had changed the original description of the 1947 condition inflow and outflow relationship.

When the subcommittee offered its report and computations to the Engineering Advisory Committee, a flurry of motions ensued. A Texas representative moved that the report of the Inflow-Outflow Subcommittee, including the computations for the period through 1955 be accepted and turned over to the commission. New Mexico representatives did not second the motion for the reason that a number of the problems had not

yet been sufficiently studied and resolved. Then a New Mexico representative moved that the Inflow-Outflow Subcommittee report be accepted and transmitted to the commission, with the understanding that the administrative computations included therein would be subject to revision as new data became available from continuing consideration and studies such as those listed in the subcommittee report. The Texas representatives declined to second the motion, noting that arithmetical errors should be corrected if discovered at some later date, but that the computations should not be considered to be provisional in other respects.

Finally the Engineering Advisory Committee agreed to forward the report to the commission "with an explanatory statement of the lack of agreement" as to how and whether it should be adopted. In the process the Texas member of the working subcommittee explained that the Inflow-Outflow Manual's Plate No. 2 "defined the 1947 condition and was not subject to change on the basis of later information." The New Mexico member replied that "as additional information becomes available it should be utilized, where possible, to better define the 1947 condition." The chairman of the committee explained the two alternatives expressed by the opposing views as a choice between accepting the 1947 condition inflow-outflow curve based on the pre-compact work of the Engineering Advisory Committee and depicted in the Inflow-Outflow Manual's Plate No. 2 or developing new computations to describe the base 1947 condition that would perforce alter both the pre-compact engineering work and the curve that resulted from it. (Stip. Ex. 2, Minutes, EAC, April 2 and 3, 1957, pp. 5-15).

Until July, 1957, the Pecos River Commission had made no findings of post-1947 departures from the 1947 condition prerequisite to the second step determination of what part of the departures were attributable to "man's activities" because

both states implicitly recognized that the commission still lacked an acceptable definition of that 1947 condition on which to base the subsequent and ultimate compact determinations. Neither state had ever moved the commission to make initial findings based on the original work of the Engineering Advisory Committee that went into S.D. 109.

At the eighth annual commission meeting, the Legal Advisory Committee reported to the commission, as it had the day before to the Engineering Advisory Committee, that the commission had authority to correct any mistakes in the inflow-outflow "computations and criteria," but that the inflow-outflow curves, graphs, and plates in S.D. 109 were "more or less sacred." The Legal Advisory Committee expressed its reluctance to change S.D. 109's "curves, graphs, and plates" not by suggesting that the commission could not alter them under the compact, but by suggesting that the commission apply a higher than normal burden of proof in assessing proposed changes, at one point referring to "substantial evidence" and at another to "clear and convincing evidence." (Stip. Ex. No. 2, Minutes, EAC, July 29 and 30, 1957, p. 2; Stip. Ex. 4, Minutes, PRC, July 29, 1957, p. 173). At its meeting in July, 1957, the commission approved and adopted the position of the Legal Advisory Committee.<sup>4</sup> At the same meeting the commission affirmed its understanding of the compact by approving and adopting a report of the Engineering Advisory Committee recommending formation of a special subcommittee to re-study the 1947 condition inflow-outflow relationships on the upper and lower reaches of the river in order to determine whether

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4. Subsequently, in a formal opinion, the Attorney General of Texas offered the same advice, concluding that "the Commission acted within its prescribed powers in adopting the . . . Review of Basic Data." See, Texas Attorney General Opinion No. M-535, December 5, 1969. [Stip. Ex. No. 12(a)(d)].

the relationships depicted by the curves in the Inflow-Outflow Manual should be modified, presumably under the evidentiary standard set forth by the Legal Advisory Committee and adopted by the commission.

The commission reaffirmed that construction of its own power in 1961 when it adopted the Review of Basic Data's altered description of the 1947 condition for the Pecos River's middle basin, the Alamogordo-state line reach. The commission minutes indicate that those alterations were adopted as:

... amendments, refinements and additions to the basic data of the commission and considered as such in all actions and findings of the commission, and as presenting the present best information on the subjects covered thereby. (Stip. Ex. 4, Minutes, PRC, January 31, 1961, p. 247).

Additionally, pursuant to the Art. V(d) 4-6, the commission jointly demonstrated its construction of the compact meaning of the critical term "1947 condition" by readopting the previous year's findings of fact for the 1950-1959 period with the correction of two computational errors. It also extended the findings through 1961 based on the same principles and the same redescribed 1947 condition.

In his report of February 2, 1979, the Master concluded that the actions of the Pecos River Commission between 1948 and 1962 did not constitute a contemporaneous construction of the meaning of Articles II(g) and III(a). While agreeing with New Mexico that the term "1947 condition" was meant to refer to a real situation, the Master refused to attribute any significance to the actions of the commissioners and their engineer advisors. On April 6, 1979, New Mexico questioned the Master's position. (New Mexico's Objection to the Report of the Special Master on Issues Raised by Paragraphs 4(a), (b), and (c) of the Pre-Trial Order). Responding to New

Mexico's objections, the Master distinguished the cases that hold that an administrative construction of disputed terms of an interstate compact is controlling, absent a compelling indication that it is wrong, by stating that administrative action "occurred from 1949 to 1961 but failed to produce a result." (Report, August 13, 1979, p. 55). According to the Master: "Twelve years of action without a result is not contemporaneous construction which aids in the construction of a legal obligation." (*Id.*, pp. 55-56).

On August 13, 1979, the Master prepared a second report, again providing the opportunity to file objections. In response to New Mexico's objections of August 31, 1979, the Master states:

New Mexico objects to the Master's conclusion that the actions of the Pecos River Commission do not constitute a construction of the Compact within the meaning of the decision of E. I. Du Pont de Nemours & Co. v. Collins, 432 U.S. 46, and similar cases. The Master adheres to his ruling. He finds nothing in Power Reactor Co. v. Electricians, 367 U.S. 396, or in Udall v. Tallman, 380 U.S. 1, which causes him to change his mind. (Report, p. 49).

We believe the Master's refusal to attribute legal significance to the administrative behavior of the Pecos River Commissioners and their engineering advisors is wrong for two reasons. First, it makes no difference whether administrative behavior produces a result.<sup>5</sup> Secondly, the Master's conclusion is indifferent to the reasoning of the cases.

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5. While it makes no difference whether administrative behavior produces a result, a result was produced by the Pecos River Commission. We fail to understand how the Master could view the commission's findings of fact in 1961 and 1962 as being something other than the consequence of the commission's unyielding efforts between 1949 and 1961 to more accurately describe the 1947 condition and to determine whether New Mexico had complied.

The dispute relates to the meaning of the 1947 condition. The question the Court should ask is whether there was any administrative action that implicitly construed the 1947 condition. We have reviewed the administrative history at length. *See, Statement 4(b) – Pecos River Commission Administrative History*, pp. 7-18; New Mexico's Trial Brief Pursuant to Paragraph 5(a) of the Special Master's Pre-Trial Order of October 31, 1977, pp. 8-17; and pp. 11-19, *supra*. The history illustrates that the 1947 condition was construed contemporaneously in the same way New Mexico seeks to have this Court construe it, viz., as a set of circumstances existing in the Pecos River Basin in 1947. The Court has held that such administrative interpretation is legally significant. *Udall v. Tallman*, 380 U.S. 1. Here, nearly all of the representatives of the states who participated in the negotiation of the compact were involved in its post-ratification administration. Under these circumstances, the Court has held, the reasoning beneath the holding in *Udall* is all the more cogent. *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408. *See also, E. I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46.

Here, the formal findings of the Pecos River Commission in 1961 and 1962 may not have been coincident with the adoption of the compact in 1948, but within the meaning of *Du Pont* and similar decisions, they were the result of contemporaneous administrative action. The record establishes that the Pecos River Commission acted between 1950 and 1962 toward the findings made in 1961 and 1962. *Cf.*, pp. 4-26, New Mexico's Statement 4(b) – Pecos River Commission Administrative History. It is true that the initial commission finding on compact compliance was not consummated until 1961, but it was nonetheless the concerted action of the representatives of both states which had the effect of construing the compact to mean that the 1947 condition referred to in Art. III(a) is, as the Master has found, the actual circumstances in the Pecos River Basin in 1947.

In response to the administrative history of the Pecos River Compact and the mutual understanding of the states' representatives respecting the meaning of the 1947 condition, Texas belittles the history. Referring to Texas's agreement to the development and use of the Review of Basic Data to account for deliveries during the 1950-1961 period, Texas states:

That the Texas commissioner took such action is uncontested. The significance of the action is, however, questionable. At best this constitutes 'fact finding' by the Pecos River Commission. Such findings are not conclusive; under the Compact's express terms they constitute only *prima facie* evidence of the facts found. (Texas's Objections, p. 20).

Aside from the facts actually found by the commission in 1961 and 1962, the fact implicitly found was that the 1947 condition is something more than its initial description. Texas shared in this view until 1969 when its new commissioner attempted to repudiate its actions and its understanding. The record generously supports this view, and the Master so found. The only support Texas can muster is a crabbed reading of Art. II(g), a reading that would render queer and irrational the behavior of all of those persons involved in the post-adoptive administration of the compact. On its face, Texas's position is not credible.

An impartial reading of the relevant compact provisions, Tipton's explanation of the compact, and the administrative history of the compact all support the Master's finding that the 1947 condition is a tangible and real stage of development on the river. To obviate the force of this support, Texas asserts that "the Master has failed to recognize the significance of the year 1957 as a turning point in the direction of the engineering studies in which the Commission was engaged." (Texas's Objections, pp. 10-11). Texas argues:

Until 1957 the Commission was not engaged in a restudy of the 1947 Condition or the description of that condition contained in the Report of the Engineering Advisory Committee. After 1957 the Commission, unquestionably, did engage in such a study — producing the Review of Basic Data's routing study describing the condition anew. Prior to 1957, however, the Commission was simply conducting studies suggested by the Inflow-Outflow Manual and attempting to remedy some deficiencies in the manual. (*Id.*, p. 11).

While the record does not support this view (*cf.*, pp. 11-19, *supra*), it is neither here nor there. The principal actors were the same men in 1957 who negotiated the compact in 1947 — they knew and agreed that the 1947 condition was reality, *i.e.*, "present conditions on the river;" as a matter of law, it makes no difference whether they administratively expressed that mutual understanding in 1950, 1953, or 1957. What's important is the fact of mutual understanding, not whether it was expressed immediately or was latent. Moreover, Texas's argument ignores the underlying reason that the states agreed that the 1947 condition had to be better understood before any meaningful administration could be undertaken: Without a reasonably accurate description of the 1947 condition the administrative obligation to isolate departures due to man's activities from gross indicated departures would be practically impossible or, at best, confusing and unproductive.

Texas acknowledges that if in compact administration it is determined that there are negative departures from the inflow-outflow-relationship being used for compact administration, it remains to be determined whether the departure is caused by man's activities:

Even after a pattern of departures from the established relationship develops, one final step remains to determine New Mexico's compliance or noncompliance with

the compact requirements. It must be determined that the departure is caused by man's activities rather than natural causes. Under Article III(a) New Mexico's obligation only extends to departures caused by man's activities. . . . (Texas's Objections, p. 6).

It is important to note that departures from the inflow-outflow relationship could result from several causes other than increased depletions by man's activities in New Mexico. Negative departures could result from the continuation of ground water uses being made in 1947, but not yet at that time fully reflected as reduction in stream flow. Departures could result from changes not the result of man's activities such as changes in infestation by salt cedar or other vegetation or channel deterioration.

Departures also could result from abnormal distribution of flood inflows between upstream and downstream reaches of the river. Arithmetically, flood inflow of a given magnitude contributes the same amount to the index inflow whether it arises in a downstream reach or upstream reach. However, the percentage of Alamogordo-Acme flood inflows arriving at the state line is much smaller than the percentage of Carlsbad-state line flood inflows arriving at the state line. Consequently, if flood inflows arising in the Carlsbad-state line reach contribute an abnormally large percentage of the total flood inflow in any year or series of years, a positive departure in state line outflow can be expected and vice versa.

Departures from the inflow-outflow relationship of Plate No. 2 could also result from error, inconsistency, or incompleteness in the routing study made to establish the inflow-outflow relationship. It is reasonable to expect that reach by reach analysis of relatively short segments of the river from the headwaters to the state line made after negative departures were indicated would result in detection of those discrepancies in the routing

study and in reliable assessment of whether the indicated departures were the result of depletion by man's activities or other causes, such as discrepancies in the studies. (See, Tr. 1074-1076, 1122, 1302-1323, 1910-1913, 1916, 2500-1508).

The Review of Basic Data was, in effect, a reach by reach analysis of the river to ascertain any error, inconsistency or incompleteness of the 1948 Engineering Advisory Committee work and to redefine as might be found necessary the 1947 condition inflow-outflow relationship portrayed by Plate No. 2 of S.D. 109. Such revision was found necessary and was effected by the commission's adoption of the Review of Basic Data. The reach by reach analysis of the Review of Basic Data could have been undertaken after the commission had found departures from the relationship shown on Plate No. 2 of S.D. 109 with effectively the same results found in the Review. However, the commission's decision to undertake reanalysis reach by reach before determining what departures, if any, from the relationship of Plate No. 2 had occurred could be reasonably expected to have the desirable effect of avoiding undue concern or unwarranted complacency and misunderstandings between the states that might result from proceeding to the reach by reach analysis after determining departures from Plate No. 2 of S.D. 109, the primary analysis tool, assuming it was known to be inaccurate.

Despite Texas' acknowledgment that "under Article III(a) New Mexico's obligation only extends to departures caused by man's activities," she objects to the Master's statement that:

If the base contains errors which affect the departure, the question is whether the departure is the result of error in the base or man's activities. Although man's activities are not the present concern, the Master believes that acceptance of an error does not convert that error into an activity of man. (Report, p. 38).

Texas seems to argue that Plate No. 2 of S.D. 109 must be

treated as an immutable schedule setting the deliveries which New Mexico must make to remain in compliance with the compact. The Master has found, however, that Plate No. 2 is not a schedule, and the record fully supports that view. The compact provides that New Mexico shall not deplete by man's activities the flow of the river beyond the equivalent of that available to Texas under the 1947 condition. Engineering mistakes are not activities of man, i.e., beneficial consumptive uses of water for which New Mexico is liable. *Cf.*, Art. II(e).

When it is understood and agreed that "under Article III(a) New Mexico's obligation only extends to departures caused by man's activities," no principle of law or equity is involved in the question whether Plate No. 2 should be revised. Common sense dictates that Plate No. 2 should be revised as soon as it is determined that it is based on error, as the Commission did in adopting the Review of Basic Data.<sup>6</sup>

**POINT II: The Review of Basic Data recognizes,  
rather than detracts from, New Mexico's  
obligations under Art. III(a).**

Texas has argued that the Review of Basic Data constitutes an impermissible change in New Mexico's obligation under

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6. Texas states that "the major task which occupied the Commission's engineers prior to 1957 was that of improving the flood inflow computation techniques provided in the manual." (Texas's Objections, p. 12). This statement apparently is intended to support Texas' argument that prior to 1957 no consideration was given any modification of Plate No. 2, which is based on the 1947 condition routing study. It is important to recognize that it is essential that the same flood inflow computation techniques that were used in the 1947 condition routing study be used in the administrative computations. Thus, any change in the techniques for administrative computations would dictate similar changes in the techniques used for the routing study.

Art III(a). In view of the “undisputed fact that the engineering reports to the negotiators contained mistakes, inconsistencies, and omissions which were promptly recognized by the agency charged with the administration of the compact” (Report, p. 37), and the fact that the 1947 condition was understood to be the physical reality of the river, the Master has found that the Review of Basic Data “*recognizes, rather than detracts from, the obligation.*” (Report, p. 41, emphasis added).

### Mistake of Fact

Missing the point, Texas argues that “(t)o the extent Article II(g) incorporates shortcomings inherent in the original routing study into its definition of the 1947 Condition, both New Mexico and Texas are bound by them.” (Texas’s Objections, p. 22). With no analytical discussion, Texas relies upon three cases: *Rhode Island v. Massachusetts*, 45 U.S. 590, *Virginia v. Tennessee*, 148 U.S. 503, and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92. In *Rhode Island* the Court said:

It may be a matter of doubt, whether a mistake of recent occurrence, committed by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both of the parties.  
(at 635).

While New Mexico believes that Texas misapprehends the law in this regard, Texas applies its imagined principle of law to a tendentious and distorted view of the facts.

The Pecos River Compact does not allocate fixed amounts or percentages of a measured flow of water, but rather makes

its apportionment by limiting man-made depletions at the New Mexico-Texas state line to an amount equivalent to the depletions resulting from man's activities in 1947. Based upon the earlier work of the Pecos River Joint Investigation, the Engineering Advisory Committee to the compact negotiators sought to determine the amount of water available for use in Texas based upon the exercise of six sets of conditions in New Mexico during the study period 1905 to 1946. One of the conditions considered was the 1947 condition, which was "intended to represent the present situation on the river." (S.D. 109, p. 10).

Considerable engineering difficulty arises from the concept of a delivery obligation based upon an inflow-outflow relationship derived from the arithmetical routing of various amounts of water through given conditions of consumption and use on the river:

. . . (Y)our suggestion places on the engineers a considerable burden. I for one am willing to accept such burden and the responsibilities it entails. I believe, however, it would be preferable if the Commission itself agrees upon some kind of condition which should obtain on the river considering all the equities of the situation. The engineers could then get together and suggest means whereby a compact would insure the administration of the river in accordance with that condition. The engineers could also analyze the condition in order to appraise its effect on each of the states. (Comments of Mr. Tipton, Stip. Ex. 14(a), Minutes, PRC, March 10 and 11, 1948, p. 31).

It may be true that the Texas negotiators assessed the amount of water that might be available to Texas on the basis of the six conditions analyzed by the Engineering Advisory Committee, but it must be remembered that the committee reasoned *from* given conditions on the river *to* the varying

amounts; in other words, the essential element of the suggested bases of the compact was in each instance a set of circumstances or a condition on the river sought to be arithmetically described, the amount reflected as available to Texas under each condition being no more than the arithmetical result of each attempted description. As the Master has found, the agreement ultimately reached by the negotiators was grounded upon one such set of circumstances on the river and not upon the resulting delivery expectations that Texas might have had by routing various amounts of water through that condition.

For each of the six conditions the Engineering Advisory Committee indicated the average amount of water they thought would become available to Texas. These amounts might be characterized as the various expectations Texas might have had with respect to each condition or routing study. Texas views the bargain embodied in the compact in terms of expectations predicated upon routing given inflows on the basis of the Report of the Engineering Advisors. However, given the fact that the compact was designed "to make secure and protect present development in the states" in 1947 instead of having been designed to obligate New Mexico to a schedule of fixed deliveries, the only analytically correct way of understanding the bargain described in Article III(a) is to focus on the efficacy of the Report of the Engineering Advisors in providing the data necessary to the protection of the 1947 development. (Art. I). Texas, however, analyzes the consideration embodied in Art. III(a) by reducing the agreement to static figures, urging that she could legitimately expect to receive on the average 264,700 acre-feet per year on the basis of the Engineering Report, but only 219,500 acre-feet under the Review. (Brief of State of Texas in Response to New Mexico's Brief in Support of Affirmative Defenses, p. 34).

The difference, according to Texas, cannot be reasonably

characterized as a "refinement." Texas's position, however, would be justified only if its premise were correct, *i.e.*, that the analytically correct way to look at the matter is to quantify average expected deliveries, albeit on data which distorts the 1947 condition in such a way as to make impossible the protection of development existing in 1947. In effect, Texas asks the Court to write into the compact the following provision:

Art. III(a) (1): If, however, the engineering data to be used in the commencement of administration pursuant to paragraph (a) of this Article shall prove to be inaccurate, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas stateline below an amount which would afford New Mexico protection for its development existing in 1913, 1923, or some other unknown date coincidentally revealed by employing such erroneous engineering data.

The bargain embodied in Article III(a) is articulated in terms of the conditions on the river in 1947; it is not written in terms of a schedule of deliveries. In order to protect the development existing in both states in 1947, the 1947 condition became the basis of the compact. The uses are physical realities. To the extent that the development in New Mexico is inaccurately described in the Engineering Advisory Report, either New Mexico or Texas would be adversely affected if the Court were to adopt Texas's argument. The evidence shows that the inaccuracies would preclude the protection of development existing in 1947; the net effect of the inaccuracies would work against New Mexico. However, no matter where the chips may fall, the element of consideration embodied in the compact requires a description of the 1947 stage of development in New Mexico that is as nearly accurate as practicality allows.

Ignoring the contemporaneous understanding of the parties, the controlling fact that Art. III(a) is conceptualized in terms

of the maintenance of the status quo in New Mexico as of 1947 with respect to the consumptive use of water by man's activities, and the fact that the administrative history of the compact provides unwavering support for New Mexico's view of the matter, Texas argues that the magnitude of the inaccuracies necessarily results in the conclusion that the adoption of the Review of Basic Data was tantamount to an unauthorized amendment of the compact:

It is apparent that the difference between deliveries under the Review of Basic Data routing and the 1947 Condition routing is as great, or greater, than the difference between the 1947 Condition routing and those of the other alternative routings considered during compact negotiations. If the differences between the 1947 and Review of Basic Data routing are as great as the differences between routings that were clearly considered distinct alternatives at the time of compacting, then the Review of Basic Data must amount to more than a 'refinement' of the 1947 Condition described in S.D. 109. . . . By adopting the Review of Basic Data and changing delivery requirements accordingly, the Commission clearly attempted to change the apportionment of water under the Compact in a manner that could have only been accomplished by formal amendment of the Compact. (Brief of the State of Texas in Response to New Mexico's Brief in Support of Affirmative Defenses, pp. 34-35).

Texas's argument is a *non sequitur*. In the second meeting after the adoption of the compact the commission promptly set out to:

Study and investigate the items recommended in the inflow-outflow manual directed toward a more accurate determination of inflow-outflow relationships. (and to) Determine more accurately the '1947 Condition' as defined in the Compact:

- (a) Obtain aerial photos of river bottom lands.
  - (b) Delineation of areas involving non-beneficial consumption of water.
  - (c) The assembly and analysis of all pertinent hydrologic data available.
- (Stip. Ex. 4(b), Minutes, PRC, December 9 and 10, 1949, p. 8).

No limit on the magnitude of correctable error was contemplated.

By subsequently adopting in 1961 the completed portions of its investigation, the commission did not modify or change New Mexico's obligation under Art. III(a), *i.e.*, the obligation not to diminish by man's activities the quantities of water Texas would receive under the 1947 condition. Texas does not distinguish between the obligation articulated in Art. III(a) and the description of that obligation contained in S.D. 109. A comparison of the 1947 condition to the other five studies is inapposite. All of the alternative "conditions" were inaccurately described. If, for instance, we sought instead to protect the New Mexico development cognizable under the 1905-A condition, we could not do so because the engineering data are wrong. We would first have to correct them.

Texas has argued that a mistake of fact at the time of the negotiations is not relevant now, *i.e.*, that it could not invalidate the compact. In other words, if the negotiators made their bargain based upon a mistaken notion of the factual elements of that bargain, they're stuck with it. *Virginia v. Tennessee; Rhode Island v. Massachusetts, supra*. We disagree with that view of the law, but Texas nevertheless applies the principle self-indulgently. The negotiators agreed that New Mexico would not deplete by man's activities the flow of the Pecos River at the state line below an amount which would give Texas a quantity of water equivalent to that available under

the 1947 condition in New Mexico. It is the 1947 condition – a physical circumstance sought to have been defined as accurately as possible in S.D. 109 – that is the crucial and sometimes misunderstood fact that cannot now be ignored and that the states are “stuck with,” in other words, no mistake of fact is involved in the compact agreed upon. The Report of the Engineering Advisors in S.D. 109 was thought to have defined the 1947 condition with accuracy, but it was well understood that the definition might require and was amenable to correction. Texas cannot now claim that the real obligation embodied in Art. III(a) is an erroneous description of the 1947 condition.<sup>7</sup>

While Texas is wrong in viewing the apportionment as being based intrinsically on an engineering description of the 1947 condition instead of the condition itself, its view of the law regarding mistake of fact is incorrect. The first case to discuss

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7. In attempting to circumvent one of the expressions of the engineer advisors' understanding that the initial 1947 condition routing study was subject to correction to better ascertain the condition, Texas argues:

The closest this language (S.D. 109, pp. 150-51) comes to suggesting modification of the 1947 Condition routing study is its suggestion that the inflow-outflow relationships provided by the manual should be modified to correspond with an improved method of estimating flood inflow which might be developed. *That the inflow-outflow relationships might be changed is not contested* – the Compact expressly provides that the entire inflow-outflow method of accounting might be replaced if a better or simpler method is developed. (Texas's Objection, p. 19, emphasis added).

Apparently, Texas does not understand the import of the fact that the engineers expressed the opinion that the inflow-outflow relationships might be changed. The relationships referred to are those shown in the Inflow-Outflow Manual, including Plate No. 2, the graphic illustration of the initial 1947 condition routing study. It makes little sense to be able to change the inflow-outflow relationship, *i.e.*, the graphic product of the 1947 condition routing study, without changing the study that produced it.

the question of whether an interstate compact can be held void on the grounds of a mistake of fact was *Rhode Island v. Massachusetts*, 45 U.S. 590 (1846). In that case Rhode Island argued by analogy to general principles of equity, contracts, and property that its boundary commissioners believed that the phrase "within. . . three English miles of the south part of Charles River," which was intended in the original English grant of Massachusetts to delimit the southern boundary of Massachusetts and what was to become the northern boundary of Rhode Island, meant within three miles of the main channel of the Charles River instead of within three miles of its most southerly tributary. Massachusetts responded to the argument not by maintaining that such a mistake could not vitiate the compact, but rather by establishing that such a mistake was highly unlikely and that the passage of time, in any event, created an estoppel.

The Court did state that "(n)o treaty has been held void, on the ground of misapprehension of facts by either or both of the parties." (p. 634). The statement, however, was not predicated on legal principle, but rather on the fact that no clear and convincing "proof of mistake" had been made in any case treating the question. Speaking of the mistake in question, the Court stated that "(f)rom the nature of this supposed mistake, it is scarcely susceptible of proof." (p. 636). Agreeing with Massachusetts, the Court found Rhode Island's claim difficult to believe and concluded that protracted sovereign possession under claim of title should be protected. (See generally pp. 628-639).

Forty-seven years later the Court addressed the issue again in *Virginia v. Tennessee*, 148 U.S. 503 (1893), where it was stated that "(a)fter such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line estab-

lished. . . ." (p. 525). Given nearly 100 years since the demarcation, as well as the acquiescence of both states for nearly that length of time, the Court held:

The compact of the two states, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both states and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by the court, has been held void on the ground of misapprehension of facts, by either or both of the parties. (p. 527, citing *Rhode Island v. Massachusetts, supra*).

The deciding factors in both *Rhode Island v. Massachusetts* and *Virginia v. Tennessee* were reliance through time and acquiescence by the states. Neither case stands for the proposition, as Texas argues, that "(a) mistake in fact at the time of compacting does not invalidate or alter the compact." (Brief of the State of Texas in Response to New Mexico's Brief in Support of Affirmative Defenses, p. 36). On the contrary, both cases were decided in recognition of the principle that such a mistake could invalidate a compact.

In *Hinderlider v. La Plata River & Cherry Ditch Co.*, 304 U.S. 92 (1938), Justice Brandeis indicated that there may be "in the proceedings leading up to a compact or in its application, some vitiating infirmity" that could render a compact nugatory. Little else was said:

There was no allegation, no evidence in the record, no suggestion in brief or argument, that the apportionment agreed upon by the commissioners was entered into without due enquiry; or that it was not an honest exercise of judgment; or that it was inequitable.(p. 109).

While Justice Brandeis' remarks were not fully explanatory, it could be concluded that either mistake of fact or fraud at the

time of compacting could amount to a "vitiating infirmity." Aside from the constitutional issue in *Hinderlider*, there was no intimation of what sort of vitiating infirmity might arise from the "application" of a compact.

Texas's argument that the commission's ultimate adoption of the corrections made in the Review of Basic Data was tantamount to an amendment of the compact is, in the ultimate analysis, an expression of Texas's regret that the obligation embodied in Art. III(a) was conceptualized in terms of a set of conditions in New Mexico instead of a schedule of deliveries to Texas. Except insofar as the water was to have been routed to the Carlsbad project as though it had been developed to 25,055 acres and to the Ft. Sumner Project as though it had been developed to 6,500 acres to protect the federal interests and promote the consent of Congress, the 1947 condition in Art. III(a) was actual and real. The parties knew that, and Texas should not be permitted to change her mind now. It is Texas that wants to amend the compact.

### **Unilateral Repudiation**

With respect to the question of whether the 1947 condition was tangible reality or an erroneous engineering description of that reality, Texas has effectively sought to repudiate the Review of Basic Data, disavowing the actions of the commission and disclaiming any responsibility for or obligation under those actions. (Stip. Ex. No. 4, Minutes PRC, February 21, 1974, pp. 468-480). The attempted repudiation was twofold. On the one hand Texas sought to relieve herself of the actual findings of the commission with respect to pre-1962 deliveries, and on the other she sought to avoid the consequences of those findings with respect to continuing compact administration.<sup>8</sup>

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8. This action could have been an action in *mandamus* in federal district court by New Mexico against the Pecos River Commission to compel continued administration. See, Comment, "Federal Question Jurisdiction to Interpret Interstate Agreements," 64 Geo. L. J. 87 (1975).

Before the Master we urged that Texas cannot unilaterally reject the findings of the Pecos River Commission. The Master responded by stating that "(w)e have not reached the point in the case where the effect of the Texas approval of the RBD for the determination of 1950-1961 departures is significant." (Report, p. 41). However, if the prohibition against unilateral repudiation has a bearing on the way in which the compact was administratively construed, as it certainly does, then it is indeed significant.

In 1961 and 1962 both states believed that the completed portion of the Review of Basic Data provided a sufficient basis upon which to predicate findings pursuant to Art. V(d) (6). The commission did so. Texas did not explicitly agree to the application of the revised data to annual flows subsequent to 1961. However, since the commission's formal adoption of the revised data, *i.e.*, since its conclusion that the data should be used to yield gross departures from the 1947 condition, different data have not been adopted. The findings that were adopted by and binding on the commission are still binding. The commission has not repudiated the Review of Basic Data.

In seeking to repudiate the binding effect of commission action, Texas sought to circumvent the compact. Article V(a) provides for a three member commission, but the federal representative has no vote. Only the signatory states can vote. The commission's internal rules made unanimity prerequisite to any commission action, whether positive or negative. (Stip. Ex. No. 4, Minutes, PRC, December 9, 1949, p. 8, Art. IV<sup>(9)</sup>, Rules of Internal Organization of the Pecos River Commission). The power to "terminate" the compact, which is no different than the power to terminate participation in the compact's administration, is left exclusively to the legislatures of *both* states by Art. XIV. Texas never moved that the commission take action on its 1974 repudiation. (Stip. Ex. 4, Minutes, PRC, February

21, 1974, p. 472). It never approached its own legislature, let alone that of New Mexico, to terminate the compact.

The Court has consistently voided unilateral state action designed to define obligations under a compact. In *Dyer v. Sims*, 341 U.S. 22 (1950), the Court regarded this element of compact law as self-evident: "It requires no elaborate argument," it was held, "to reject the suggestion that an agreement solemnly entered into between states by those who alone have political authority to speak for a state can be unilaterally nullified or given final meaning by an organ of one of the contracting states." (341 U.S., at p. 28).

In *Dyer*, the West Virginia Supreme Court had voided altogether state participation in a previously entered multistate compact. Here, no coordinate branch of the Texas government nullified previous state participation in the Pecos River Compact. The Texas commissioner attempted to do it himself. In doing so he challenged the Pecos River Compact — which is as is, not as he would want it to be. Texas refuses to recognize that the power to administer a compact can only arise as a delegation of compact power, which is equally as exempt from unilateral state control as the compact itself. (Cf., *Hinderlider v. La Plata River*, 304 U.S. 92, 108). (See also, *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 285 (1959)).

Texas and New Mexico have jointly construed the compact to mean that the 1947 condition referred to in Art. III(a) is immutable, but that its description in the original engineering report is not. The Pecos River Commission also defined its view of the extent to which the compact contemplated that the definition of the 1947 condition contained in the initial report of the engineering advisors could be corrected or changed by subsequent administrative action when it adopted the Review of Basic Data in 1961. Texas cannot now change its mind.

## CONCLUSION

The Master first reached his conclusion on the 1947 condition in his tentative report of February 2, 1979. After considering the parties' objections, he commented on his decision:

Gentlemen, I have carefully read your objections and exceptions to the February 2 Report. Let me say that from my experience of practicing law for over thirty years and being a Judge for, in a few weeks it will be twenty-five years, I have full realization that the worst way any Judge can decide a case is to decide against the contentions of all of the parties. It was with that realization and the hazards it presents that I made the report which I did, which in effect rejects the basic contentions of each State. (Tr. 2984-2985).

On the one hand, the Master has decided that the "1947 condition" is, as the compact negotiators understood in December, 1947, a term describing the "present conditions on the river," (S.D. 109, p. xxvi). In reaching that conclusion, the Master rejected Texas's attempt to unilaterally repudiate its own administrative construction of the compact. On the other hand, by orally construing his conclusion on the 1947 condition as meaning that the 1947 condition stage of development does not include the ground water uses developed before 1947, except to the extent that the effects of those uses had already been reflected in the flow of the Pecos River in 1947, the Master has effectively concluded that the 1947 condition was real with respect to surface water depletions, but not with respect to ground water depletions. Accordingly, New Mexico's understanding of the compact and its history was rejected.

We each, of course, believe that the Master was half right. Unlike Texas, however, New Mexico need not repudiate twenty years of cooperative compact administration and mutual understanding to clear the way to assert a novel theory of compact

meaning. New Mexico's view today is the same as it was when the compact was agreed upon and adopted. In this light we respectfully request that the Court overrule the Special Master and remand the case with instructions to proceed with trial with the understanding that: 1) the 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man made depletions resulting from the stage of development existing in 1947 even though the effects of those depletions had not yet been fully reflected in the flow of the river, and 2) the development that occurred during the year 1947 is part of that condition.

Respectfully submitted,

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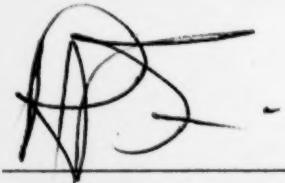
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**CERTIFICATE OF SERVICE**

Pursuant to Rules 42(5) and 33 of the Supreme Court Rules, I certify that three copies of the foregoing reply to Texas's objections were served upon counsel of record on December 27, 1979.



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